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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DEMETRIUS POLYCHRON vs. JEFF BEZOS, et al.,	Plaintiff, Defendants.	Case No.: 2:23-cv-02831-SVW-E PLAINTIFF'S OPPOSITION TO AMAZON DEFENDANTS' MOTION TO DISMISS Hearing Date: August 28, 2023 Hearing Time: 1:30pm Complaint filed: April 4, 2023 Amended Complaint Filed: July 13, 2023
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1 Plaintiff, Demetrious Polychron, by counsel, submits his opposition to the Motion
2 to Dismiss filed by Amazon Studios LLC, Amazon Content Services LLC, Patrick
3 McKay, John D. Payne, Jeff Bezos and Jennifer Salke (the “Amazon Defendants”).

4 Dated: August 7, 2023

Respectfully submitted,

5 Katie Charleston Law, PC

6 By: /s/ *Katie Charleston*
7 Katie Charleston, Esq.
8 Attorney for Plaintiff

PLAINTIFF’S OPPOSITION TO AMAZON DEFENDANTS’ MOTION TO DISMISS

1 **I. INTRODUCTION**

2 This case was prompted by Defendants illegally, and without authorization,
 3 incorporating Plaintiff's literary work into an Amazon Prime series titled "The Lord of
 4 the Rings: The Rings of Power ("ROP")." In the center of this case is an independent
 5 author who wrote an original work of authorship, "The Fellowship of the King." There is
 6 no dispute that Plaintiff, like so many other artists, was inspired by the fantasy series, The
 7 Lord of The Rings, by J.R.R Tolkien. J.R.R. Tolkien is known to many as the Father of
 8 Fantasy because of his influence and inspiration in modern fantasy. Many of these works,
 9 such as Game of Thrones and Star Wars, have enjoyed success and undisputed copyright
 10 protection despite their source of inspiration. Though not yet as successful as George R.
 11 Martin or George Lucas, Plaintiff is entitled to the same copyright protection as any other
 12 fantasy artist inspired by J.R.R Tolkien's works. J.R.R. Tolkien himself was inspired by
 13 and took concepts and characters from his predecessors in the literary world, like George
 14 McDonald, Elias Lonnrot, and Greek and Nordic Mythology. Though his concepts and
 15 characters were borrowed from others, J.R.R Tolkien used them to create an original
 16 work, garnering him a valid copyright, and so has Defendant here.

17 Plaintiff presents as an easy target for giants such as Amazon and the Tolkien
 18 Estate to infringe upon. Amazon's series, ROP, is substantially similar to the wholly
 19 original elements in Plaintiff's work. Characters, plot points, and themes were lifted
 20 directly from Plaintiff's work. Every Defendant had actual and constructive knowledge
 21 of Plaintiff's copyrights. However, it was the Tolkien Defendants who provided Amazon
 22 with the infringing elements to produce ROP, which was widely distributed on Amazon
 23 platforms. This egregious and unlawful infringement has continued despite notice to
 24 Defendants.

25 The instant motion brought by these Defendants is wholly inappropriate and
 26 improper as the Defendants have unlawfully presented evidence beyond the face of the
 27 Complaint or as would be required for the Court to engage in the extrinsic test analysis,
 28 with the knowledge that Plaintiff has met his minimal notice pleading requirements, and

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1 have demonstrated that the two works at issue are substantially similar. The Defendants
 2 have essentially brought a motion for summary judgment before any discovery has been
 3 conducted to preclude Plaintiff from fairly litigating this matter. However, since Plaintiff
 4 has met his minimal pleading burden, the motion must be denied, and the Defendants
 5 must answer the Complaint.

6 II. FACTS

7 Plaintiff, using his own skill, labor, and judgment, created an original work, *The*
8 Fellowship of the King (The Work). [First Amended Complaint (“FAC”) ¶ 21]. Although
 9 inspired by Tolkien’s works, The Work is a wholly original work, including separate and
 10 distinct characters and storylines. [FAC ¶ 30]. On November 21, 2017, Plaintiff secured
 11 the exclusive rights and privileges in and to the book of authorship, receiving from the
 12 Register of Copyrights a certificate of registration dated and identified as, *The Fellowship*
 13 *of the King*, TXU2-076-068. [FAC ¶ 22].

14 Defendant Simon Tolkien controls both The Tolkien Estate Limited and The
 15 Tolkien Trust. [FAC ¶ 25] On November 21, 2017, after obtaining the copyright,
 16 Plaintiff contacted the Tolkien Estate seeking a review of The Work and a collaboration
 17 based on The Work. [Compl.26]. Receiving no response, on November 7, 2019, Plaintiff
 18 retained counsel to contact Defendant Simon Tolkien regarding collaboration, and Simon
 19 Tolkien, through counsel, refused. [FAC ¶ 27]. On December 24, 2019, Plaintiff
 20 delivered a copy of The Work to Defendant Simon Tolkien. [FAC ¶¶ 28-29]. The copy
 21 indicated The Work was copyrighted. *Id* On January 14, 2019, and after receiving no
 22 response, Plaintiff requested Defendant Simon Tolkien return the copy and Simon
 23 Tolkien obliged. *Id*.

24 However, before sending the copy back to Plaintiff, Defendant Simon Tolkien
 25 reviewed or copied the manuscript and presented or conveyed either The Work in its
 26 entirety or substantial elements of The Work to the Amazon Defendants when
 27 collaborating to create the series *Rings of Power*. [FAC ¶ 31]. The original characters,
 28 storylines, and elements in The Work compose as much as one-half of the 8-part series,

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1 *Rings of Power*. [FAC ¶ 30] Defendants were not authorized to use any character,
 2 storyline, or element from The Work. [FAC ¶ 43]. The Amazon Defendants distributed
 3 *Rings of Power*, which continues to be available on Amazon Prime despite the Tolkien
 4 Defendants' knowledge of Plaintiff's copyright. [FAC ¶¶ 59, 63, 66].

5 **III. ARGUMENT**

6 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement
 7 of the claim showing that the pleader is entitled to relief," in order to "give the defendant
 8 fair notice of what the ... claim is and the grounds upon which it rests," *Bell Atl. Corp. v.*
 9 *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007).

10 To claim direct copyright infringement Plaintiff must allege facts showing 1)
 11 ownership of a valid copyright and 2) copying of constituent elements of the work that
 12 are original. *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, 679 F. Supp. 2d 312, 318
 13 (E.D.N.Y. 2010). A certificate of registration shall constitute prima facie evidence of the
 14 validity of the copyright and of the facts stated in the certificate. 17 U.S. Code § 410.

15 To claim contributory infringement Plaintiff must allege a direct infringer infringed
 16 Plaintiff's copyrights in a work and the contributory infringer contributorily infringed
 17 Plaintiff's copyright by showing: 1) the defendant knew or had reason to know of the
 18 infringing activity of the direct infringer and 2) the defendant intentionally induced or
 19 materially contributed to direct infringer's infringing activity. *A&M Recs., Inc. v.*
 20 *Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001). Courts have ruled that personal
 21 conduct that encourages or assists the infringement is a material contribution for material
 22 infringement. *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001), as
 23 amended (Apr. 3, 2001), aff'd sub nom. *A&M Recs., Inc. v. Napster, Inc.*, 284 F.3d 1091
 24 (9th Cir. 2002), and aff'd sub nom. *A&M Recs., Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th
 25 Cir. 2002).

26 Vicarious infringement occurs when one profits from direct infringement while
 27 declining to exercise a right to stop or limit it. *Luvdarts, LLC v. AT & T Mobility, LLC*,
 28 710 F.3d 1068, 1071 (9th Cir. 2013). Vicarious liability attaches if the Carriers had both

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1 the (1) “right and ability to supervise the infringing activity” and (2) “a direct financial
 2 interest” in the activity. *Id.*

3 **A. PLAINTIFF HAS SUFFICIENTLY PLEADED THE ALLEGATIONS
 4 IN THE FAC.**

5 Federal law requires only “a short and plain statement of the claim showing that
 6 the pleader is entitled to relief.” Federal Rule of Civil Procedure 8(a)(2). Plaintiff must
 7 give the defendant fair notice of what the claim is and the grounds upon which it rests.
 8 *Twombly, supra*, 550 U.S. at 1964. Here, Plaintiff has specifically claimed contributory
 9 infringement and vicarious infringement. Further, Plaintiff has laid out the facts upon
 10 which each claim rests.

11 **B. DIRECT INFRINGEMENT HAS BEEN SUFFICIENTLY PLEADED
 12 BY PLAINTIFF**

13 To claim direct copyright infringement Plaintiff must allege facts showing 1)
 14 ownership of a valid copyright and 2) copying of constituent elements of the work that
 15 are original. *FragranceNet.com, Inc.* 679 F. Supp. 2d at 318. Plaintiff has had a valid
 16 registered copyright of The Work since November 21, 2017. [FAC ¶ 22]. Due to the
 17 rarity of direct evidence, a Plaintiff may raise an inference of use by “showing the
 18 defendant[] had access to [the plaintiff’s] ideas and the defendant[’s] work is substantially
 19 similar to the plaintiff[’s] ideas.” *Esplanade Prods., Inc. v. Walt Disney Co.*, No.
 20 B315859, 2023 WL 4614822, at *8 (Cal. Ct. App. July 19, 2023). To establish access
 21 sufficient to raise an inference of use, Plaintiff must show Defendant “had an opportunity
 22 to view or to copy” Plaintiff’s work. *Id.* Defendants had access to Plaintiff’s work.
 23 [FAC ¶ 29].

24 **i. PLAINTIFF HAS A VALID COPYRIGHT**

25 Plaintiff has had a valid registered copyright of The Work since November 21,
 26 2017. [FAC ¶ 22]. The manuscript submitted by Plaintiff to the copyright office and to
 27 Defendant Simon Tolkien and the book published contain the same elements, and any
 28 differences between the two are merely editorial. Edits such as correcting spelling,

1 punctuation, and grammar, or making other minor changes, revisions, or other
 2 modifications to a preexisting work do not render the edited work a derivative work for
 3 which new copyright registration is required. *Compendium of U.S Copyright Office*
 4 *Practices*: 3rd ed section 709.4. Even adopting Defendants' argument that some of the
 5 elements in The Work are not protected (which we do not), the elements there are still
 6 numerous original elements Defendants infringed upon in ROP.

7 **ii. THE FELLOWSHIP OF THE KING IS A WHOLLY ORIGINAL**
 8 **WORK**

9 Plaintiff does not intend for or represent that The Work is a sequel. Defendants'
 10 claim that Plaintiff alleges *The Fellowship of the King* is a “sequel” to Tolkien’s The Lord
 11 of the Rings misstates the Complaint. [MTD pg. 9, line 4-6]. As referenced, the
 12 paragraph in the Complaint states that Plaintiff wanted to collaborate with Tolkien
 13 regarding the work *as a sequel*. [FAC ¶ 27] The Work can stand independently even if
 14 the reader has no prior knowledge of *The Lord of the Rings*.

15 Defendants claim that The Work is an unauthorized derivative of *The Lord of the*
 16 *Rings* and, therefore, not protected by copyright is flawed. Defendants rely heavily on
 17 their assertion that The Work is a sequel to *The Lord of the Rings* and is factually
 18 consistent with *Anderson v. Stallone*. *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989
 19 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989). However, the facts here are completely
 20 distinguishable. In *Anderson*, Plaintiff used a storyline suggested by Stallone himself on
 21 numerous occasions and relied on the exact same characters, completely unchanged. *Id.*
 22 The Plaintiff in *Anderson* also failed to create new characters or modify the characters at
 23 all. *Id* at 8. Further, the Court in *Anderson* makes clear that the Rocky movies are based
 24 upon the relationship of the characters over time and are not full of complexity, which is
 25 entirely different from The Work, which not only takes characters and changes them but
 26 adds new characters with new names, backgrounds, plots, and even races. *Id.* Thus,
 27 unlike *Anderson*, our client created his own unique storyline without suggestion from any
 28 //

1 Defendant and created original unique characters so that the original elements pervade
 2 The Work, not elements from J.R.R Tolkien's Lord of the Rings.

3 **iii. DEFENDANTS HAD ACCESS TO PLAINTIFF'S WORK**

4 Plaintiff has sufficiently pleaded Defendants' access to The Work. Plaintiff hand-
 5 delivered a copy of his work to Defendant Simon Tolkien. [FAC ¶ 28-29]. Defendant
 6 Simon Tolkien returned the manuscript weeks later following Plaintiff's request. *Id.*
 7 Defendant Simon Tolkien controls both The Tolkien Estate Limited and The Tolkien
 8 Trust. [FAC ¶ 25]. The Tolkien Defendants sold rights to and developed a series with
 9 Amazon that subsequently incorporates The Work. [FAC ¶ 29]. Plaintiff has pleaded
 10 nothing short of connecting the dots from The Work to Amazon through the Tolkien
 11 Defendants. All three Tolkien Defendants had direct access to Plaintiff's work for weeks
 12 to read, duplicate and share with whomever they pleased, and most definitely, Amazon
 13 amid its production of the ROP. Direct evidence is indeed rare, but this evidence clearly
 14 draws the line to access.

15 **C. CONTRIBUTORY INFRINGEMENT HAS BEEN SUFFICIENTLY
 16 PLEADED BY PLAINTIFF**

17 To claim contributory infringement Plaintiff must allege a direct infringer infringed
 18 plaintiff's copyrights in a work and the contributory infringer contributorily infringed
 19 plaintiff's copyright by showing: 1) the defendant knew or had reason to know of the
 20 infringing activity of the direct infringer and 2) the defendant intentionally induced or
 21 materially contributed to direct infringer's infringing activity. *A&M Recs., Inc. v.
 22 Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001). Plaintiff has made this claim against
 23 Defendants Simon Tolkien, The Tolkien Estate Limited, and The Tolkien Trust. [See
 24 FAC].

25 **i. AMAZON DEFENDANTS KNEW OR HAD REASON TO
 26 KNOW OF THE INFRINGING ACTIVITY.**

27 Knowledge can be actual or constructive. *Napster, Inc.*, 239 F.3d at 1019. As
 28 outlined above, Plaintiff has properly alleged Amazon Defendants had sufficient access

1 through Simon Tolkien. The manuscript itself showed Plaintiff's copyrights. [FAC ¶ 28].

2 **ii. AMAZON DEFENDANTS MATERIALLY CONTRIBUTED TO**
 3 **INFRINGEMENT**

4 In *A&M*, A&M Records sued Napster for contributory copyright infringement,
 5 among other causes of action. *Napster, Inc.*, at 239 F.3d at 1019. Acts such as failure to
 6 remove copyrighted material is a material contribution to infringement if the defendant
 7 had sufficient knowledge. *Id.* Knowledge can be actual or constructive. *Id.* Napster's
 8 failure to remove the material and thereby stop an infringing copy from being distributed
 9 worldwide constituted substantial participation in distribution of copyrighted material.
 10 *Id.*

11 Similarly, in *Dish Network L.L.C. v. Jadoo TV, Inc.*, Dish notified Jaboo of
 12 infringing content on eMedia in 2016 and Jadoo did nothing to limit it. *Dish Network*
 13 *L.L.C. v. Jadoo TV, Inc.*, No. 20-CV-01891-CRB, 2023 WL 4004115, at *14 (N.D. Cal.
 14 June 13, 2023). When Dish filed a lawsuit in November 2018, Jadoo still waited until
 15 August 2019 to remove eMedia. *Id.* The court ruled in favor of Dish, stating that because
 16 Jaboo did nothing for over two and a half years to "diminish the infringing activity," it
 17 induced infringement. *Id.*

18 In the present case, all Amazon Defendants failed to remove or provide direct
 19 removal of the infringing series *Rings of Power* and therefore, are liable for contributory
 20 infringement. The FAC makes clear that all Amazon Defendants are liable for
 21 Contributory Infringement as it is not only under the heading but in the body of the
 22 paragraph. Defendants assert the two Amazon companies are not mentioned, however,
 23 they are mentioned twice under the heading of contributory infringement. The Amazon
 24 Defendants distributed *Rings of Power*, which continues to be available on Amazon Prime
 25 despite the Tolkien Defendants' knowledge of Plaintiff's copyrights. [FAC ¶ 59, 63, 66].

26 **D. VICARIOUS COPYRIGHT INFRINGEMENT IS SUFFICIENTLY**
 27 **PLEADED**

28 Vicarious infringement occurs when one profits from direct infringement while

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1 declining to exercise a right to stop or limit it. *Luvdarts, LLC v. AT & T Mobility, LLC*,
 2 710 F.3d 1068, 1071 (9th Cir. 2013). Vicarious liability attaches if the Carriers had both
 3 the (1) “right and ability to supervise the infringing activity” and (2) “a direct financial
 4 interest” in the activity. *Id.*

5 **i. AMAZON DEFENDANTS PROFITED FROM RINGS OF
 6 POWER**

7 Defendant Bezos has publicly stated *Rings of Power* has made substantial profits.
 8 <https://www.syfy.com/syfy-wire/jeff-bezos-says-the-rings-of-power-goes-beyond-making-money>.

9 **ii. AMAZON DEFENDANTS DECLINED TO STOP INFRINGING
 10 ACTIVITY**

11 Plaintiff has pleaded that the Amazon Defendants distributed *Rings of Power*,
 12 which continues to be available on Amazon Prime despite the Tolkien Defendants’
 13 knowledge of Plaintiff’s copyrights. [FAC ¶¶ 59, 63, 66]. To date, the series continues
 14 to be available publicly.

15 **E. UNREGISTRABLE ELEMENTS AND ALLEGED TOLKIEN
 16 ELEMENTS**

17 Federal Rule of Civil Procedure 12(f) permits courts to strike certain material
 18 “from a pleading.” The rules define a pleading as “(1) a complaint; (2) an answer to a
 19 complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer
 20 to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and
 21 (7) if the court orders one, a reply to an answer.” Fed. R. Civ. P. 7(a). A pleading does
 22 not include a motion to dismiss or briefs filed in support thereof. *Id.*

23 Thus, a motion to strike is not an available remedy for improper factual assertions
 24 made in a motion to dismiss. *Horton v. HSBC Bank*, 2013 WL 2452273 at *9 (N.D. Ga.
 25 2013); *see also Polite v. Dougherty Cty. Sch. Sys.*, 314 Fed. App’x 180, 184 n.7 (11th Cir.
 26 2008). However, such a motion is unnecessary because a court, on a motion to dismiss,
 27 must accept the allegation as true and cannot consider the extraneous evidence. *Poer v.*

28 **PLAINTIFF’S OPPOSITION TO AMAZON DEFENDANTS’ MOTION TO DISMISS**

1 *Jefferson Cnty. Comm'n, No. 2:19-CV-1361-AKK*, 2020 WL 1987272, at *3 (N.D. Ala.
 2 Apr. 27, 2020).

3 While the Court may use the extrinsic test to determine the extent of similarity
 4 between two works at issue, a determination of whether a work is a derivative is a
 5 question of fact and is inappropriate for determination on a motion to dismiss.
 6 *FragranceNet.com, Inc.* 679 F. Supp. 2d at 323. “The court’s function on a Rule 12(b)(6)
 7 motion is not to weigh the evidence that might be presented at a trial but merely to
 8 determine whether the complaint itself is legally sufficient.” *Id* at 324.

9 Although the court can rule on whether two works are substantially similar using
 10 the extrinsic test in a motion to dismiss, it is too early in the present case to rule on this
 11 issue. *Alfred v. Walt Disney Company* (9th Cir. 2020) 821 Fed.Appx. 727, 729. Even
 12 with ‘striking differences’ between two works, a party can survive a motion to dismiss if
 13 the similarities are more than *di minimus*. *Alfred v. Walt Disney Company* at 729.
 14 Further, at this stage of the litigation, it is too early to determine which elements are
 15 unprotectable material. *See Id.*

16 In *Alfred v Walt Disney Company*, Plaintiff Alfred brought an action for copyright
 17 infringement against Walt Disney Company claiming *The Pirates of the Caribbean: Curse of the Black Pearl*, infringed on a screenplay written by Plaintiff. *Walt Disney Company* at 729. Disney filed a motion to dismiss, arguing the two works were not substantially similar. *Id.*.. The film and the screenplay included battles at gunpoint, treasure stories, jewel-filled caves, mutiny, skeleton pirate crews, and a young rogue pirate. *Alfred, supra*, 821 Fed.Appx. at 729. The district court ruled in favor of Disney and dismissed the action largely because the court concluded these elements were unprotectable, generic pirate tropes. *Id* at 730. Alfred appealed to the Ninth Circuit. The Ninth Circuit reversed the decision reasoning, “at this stage of the litigation, it is difficult to know whether such elements are indeed unprotectible material.” *Id.* The Ninth Circuit went on to say “[T]here are striking differences between the two works, as well—but the selection and arrangement of the similarities between them is more than *de minimis*.” *Id.*

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In the present case, Defendants claim many of the similarities raised by Plaintiff are scenes a faire. Specifically, Defendants point to healing potions, three evil women, women riding horses, and the blindfolded queen as scenes a faire. However, based on the Ninth Circuit ruling, which stated it was too early to determine whether elements like treasure stories were unprotectable, generic pirate tropes, here it is similarly too early to determine these items which Defendants claim are scene a faire are in fantasy tales. Expert assistance would aid in the determination of these issues.

IV. CONCLUSION

For the foregoing reasons, Plaintiff requests the Court deny the Amazon Defendants' Motion to Dismiss and for all other just and proper relief. In the alternative, if the Court is inclined to grant the Motion to Dismiss, Plaintiff requests leave to amend his complaint to add facts to meet any deficiencies.

Dated: August 7, 2023

Respectfully submitted,

Katie Charleston Law, PC

By: /s/ *Katie Charleston*
Katie Charleston, Esq.
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Plaintiff, certifies that this brief contains 3,171 words, which complies with the word limit of L.R. 11-6.1.

/s/ *Katie Charleston*
Katie Charleston, Esq.